SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 180.

ALLEN R. ENGLISH AND HONORA ENGLISH, HIS WIFE, APPELLANTS,

vs.

THE TERRITORY OF ARIZONA, AT THE RELATION AND TO THE USE OF JOHN W. BOGAN, TREASURER AND EX-OFFICIO TAX COLLECTOR IN AND FOR THE COUNTY OF PIMA, IN THE TERRITORY OF ARIZONA, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This is an appeal from the judgment of the Supreme Court of the Territory of Arizona affirming the judgment in favor of the appellee rendered by the trial court.

The city of Tucson is an ancient Spanish pueblo, and its principal thoroughfare, Congress street, prior to June, 1903, was narrow and crooked, and parts of it were obstructed by triangular-shaped blocks. One of these was designated as

block No. 206. In June, 1903, the owners of the majority of the lineal frontage upon this block, among whom was the appellant English, filed a petition with the recorder of the city of Tucson praying that all of block 206 be condemned, and that Congress street be widened so as to include the whole of it (Abstract, folio 308).

On the same day the Mayor and Common Council of Tucson, in response to the petition, passed Ordinance No. 168 (Abstract, folio 307). The ordinance (printed in full in Appendix "A") provides that the cost of the improvement shall be paid by special assessment, to be levied upon the property benefited; that proceedings shall be instituted to condemn all private ownership in block No. 206, and to award just compensation for the property taken. An action was accordingly instituted by the City of Tucson against the owners of block 206, judgment of condemnation entered, and damages fixed in the sum of $46,500.00 (Abstract, folio 308).

Thereafter and in the same action the plaintiff filed a supplementary petition praying the court to cause an assessment to be made upon the property benefited by the improvement for the purpose of paying the compensation awarded, and in December, 1903, the court appointed commissioners to make the assessment (Abstract, folio 309). The commissioners qualified, met, and fixed a time and place when and where they would meet to consider objections to assessments, namely, December 24, 1903, and the City Hall, and notice was given accordingly. Such notice was given to the appellant English (Abstract, folio 311). In the meanwhile the commissioners examined the locality of the improvement, examined the property to be assessed, and made the assessment, and assessed each lot and parcel benefited by the assessment in the amount it was actually benefited by the improvement and no more (Abstract, folio 310). The assessment so made was incorporated in the assessment-roll, in which appeared the names of the owners, a description of

each parcel of land assessed, and the amount assessed as benefits thereto (Abstract, folio 310). The appellant English was the owner of a large lot contiguous to the improvement, lot 5, in block 197, and was assessed $12,533.75.

At the time and place designated in the notices, the commissioners met, so as to permit all persons interested in the assessment to appear and make known their objections. At this meeting English appeared, by his attorney, and stated that he did not desire to object, but only wanted to save his rights in case he should want to object.

Upon the hearing it appeared to the commissioners that the property of English was assessed in the just amount of benefits by the improvement, and the roll was not changed. The commissioners thereupon certified the assessment to the Common Council of the city, together with all the testimony taken at the hearing (Abstract, folios 312-313).

Upon the presentation of the assessment-roll and on December 30, 1903, the Common Council of the city examined the roll and the assessments therein contained and, finding no injustice, confirmed the assessments. The appellant did not feel himself aggrieved by reason of the determination of the council and did not within twenty days appeal therefrom, nor has he since made or attempted to make any such appeal (Abstract, folio 314).

After the assessment had been made and confirmed a warrant was issued for its collection and delivered to the city tax collector (Abstract, folio 315). The collector immediately gave notice that he held the warrant for collection, and personally called upon English, requesting him to pay (Abstract, folio 316). Appellant failed and refused to pay the assessment or any of it and the whole became delinquent (Abstract, folio 317). A suit was then, about the month of April, 1904, instituted by the city to recover the assessment, but no action beyond bringing the suit was taken.

On December 21, 1904, the city collector, having failed to collect the assessment, by suit or otherwise, and the assessment being then due and unpaid, made a report in writing to the general officer of Pima County authorized to collect

county and territorial taxes. In this report the assessment against the property of English was set out fully (Abstract, folio 318). Upon receipt of this report and delinquent list the county collector incorporated the city delinquent list with the county delinquent list (Abstract, folio 319). The delinquent assessment against English was then duly extended upon the back-tax book (Abstract, folios 319-320-321). The county collector endeavored to collect the assessment from English, but was unable to do so, and brought the present action to enforce payment. The former suit brought by the city was dismissed.

English was acquainted with the assessment proceedings from first to last, and at no time objected. On the other hand, he was anxious that the improvement should be made and aided and assisted the city in making it (Abstract, folios 323-324). The city, in order to raise the money owed by English, issued its bonds—for the owners of the property condemned had to be paid in cash—and English assisted the city in the sale and disposal of these bonds (Abstract, folio 324), bonds the city is now obligated to pay.

The facts above set forth are found by the Supreme Court of the Territory and are embodied in the statement of facts on appeal (Abstract, folios 305 to 325).

Upon these facts appellants contend:

1. That the trial court erred in not sustaining the plea of another suit pending.

2. That the trial court erred in not finding that the petition for removal of block 206 contained the statement that all of said block should become a part of Congress street.

3. That the trial court erred in refusing to find that the city did not appoint an appraising committee.

4. That the trial court erred in not finding that no notice was given of the meeting of the Common Council upon the confirmation proceedings.

5. That the assessment was by the front-foot rule and not for benefits.

6. That the appellee cannot maintain this action.

ARGUMENT.

The General Scheme for Assessments.

Appellants' assignment of errors is bad and does not comply with the rules of this court, for the reason that the errors are not specified (Texas and Pacific R. R. *v.* Archibald, 170 U. S., 668). Should the alleged errors be considered, however, and to the end that the court may gain a conception of the matters sought to be urged, the general scheme for making special assessments provided by the statutes of the Territory of Arizona is briefly given:

1. A petition for the making of the improvement, signed by the owners of the majority of lineal frontage upon the improvement, shall be filed with the city recorder.

Section 466 of the Revised Statutes of Arizona, 1901, Appendix "B."

2. An ordinance shall be passed by the Common Council which shall prescribe whether the improvement shall be made by special assessment, or by taxation of contiguous property or by general taxation, or both; and, further, the ordinance shall specify the nature, character, locality, and description of the improvement, and when property is to be taken the ordinance should so provide.

Sections 466, 467, and 470, Revised Statutes of Arizona, 1901, Appendix "B."

3. *A*. When the ordinance does not require the taking of property, a committee of three shall be appointed by the Common Council to examine the premises, estimate the cost of the improvement and other expenses, and report the same in writing to the Common Council.

Section 471, Revised Statutes of Arizona, 1901, Appendix "B."

B. When the ordinance does provide for the taking of property, the proceedings for making just compensation therefor shall be as provided in title 21, Revised Statutes of this Territory (Eminent Domain); where the improvement contemplated by the ordinance is the taking of property, the court shall fix the cost of the improvement, *i. e.*, the just compensation for the property taken, with the costs of the proceedings.

Sections 467 and 496, Revised Statutes of Arizona, 1901, Appendix "B."

4. *A.* When the ordinance does not provide for the taking of property, a second committee shall be appointed by the Common Council, who shall make an assessment upon the property benefited, to raise the amount estimated by the first committee appointed by the council. The committee shall give notice to the property-owners of the time and place when and where they shall meet to hear objections and evidence; they shall make an assessment-roll, therein assessing the benefits, and shall return the roll, together with the testimony taken, to the Common Council.

Sections 472-473-474 and 475, Revised Statutes of Arizona, 1901, Appendix "B."

B. When the ordinance does provide for the taking of property, proceedings to condemn shall be instituted as provided in Title XXI, Revised Statutes. When in this proceeding the property shall have been condemned and the amount of compensation adjudged, then a supplemental petition shall be filed in the court, and the court shall appoint an assessment committee to assess the amount necessary and as fixed by the court. This committee shall meet, give notice to property-owners, make the assessment and assessment-roll, and report to the Common Council. This committee shall be governed by the same rules as those provided for the assessing committee appointed by the Common Council.

Section 496, Revised Statutes of Arizona, 1901. Appendix "B."

5. The Common Council, upon receiving the assessment-roll, shall proceed to modify, confirm, or reject the roll and assessment, and upon the testimony taken by the assessment committee; and if the assessment be confirmed, or modified and confirmed, it shall stand as a valid tax and be a lien upon the property as general taxes are.

Section 475, Revised Statutes of Arizona, 1901, Appendix "B."

It is further provided:

> "If the owner of any parcel of land assessed for such improvement by special tax feels himself aggrieved by reason of the determination of the Common Council, he may, within twenty days (20) after the date of such determination, appeal therefrom to the District Court."
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> Section 478, Revised Statutes of Arizona, 1901, Appendix "B."

> "The appeal given by the last section shall be the only remedy of the owner of any parcel of land, or of any person interested therein, affected by said improvement, for the redress of any grievance he may have by reason of the making of such improvement."
>
> Section 478, Revised Statutes of Arizona, 1901, Appendix "B."

> "And in any action before any court wherein the question of the validity of such assessment is an issue, no defense or objection shall be made or heard, which might have been interposed in the proceedings for the making of such assessment or the application for the confirmation thereof."
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> Section 483, Revised Statutes of Arizona, 1901, Appendix "B."

The statutes of the Territory of Arizona relative to special assessments are contained in the appendix to this brief and marked Exhibit "B."

Reply to Contentions of Appellants.

In answering the contentions of the appellants, I shall confine myself to the facts found by the Supreme Court of Arizona.

By act of Congress "Concerning the practice in territorial courts and appeals therefrom," approved April 7, 1874 (18 Stat., pt. 3, page 27), the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of the territorial courts is to be exercised in all cases tried to the court without a jury, by appeal; and in such cases, instead of the evidence at large, a statement of the facts of the case, in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the Supreme Court of the Territory or a judge thereof and transmitted to this court with the transcript of the proceedings and judgment or decree.

This court has settled by a long line of decisions that the facts certified by the lower court are conclusive on this court, and that the only question to be determined here is whether the facts so found support the judgment or decree.

> "Congress has prescribed that the appellate jurisdiction of this court over 'judgments and decrees' of the territorial courts, in cases of trial by juries, shall be exercised by writ of error, and in all other cases by appeal; and, on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below; and transmitted to this court with the transcript of the record (act of April 7, 1874, c. 80, sec. 2, 18 Stat., 27, 28). The necessary effect of this enactment is that no judgment or decree of the highest court of a Territory can be reviewed by this court in matter of fact, but only in matter of law. As observed by Chief Justice Waite: 'We are not to con-

sider the testimony in any case. Upon writ of error we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and, upon an appeal, to the statement of facts and rulings certified by the court below. The facts set forth in the statement which must come up with the appeal are conclusive on us' (Hecht *v.* Boughton, 105 U. S., 235, 236. See also: Salina Stock Co. *v.* Salina Creek Irrigation Co., 163 U. S., 109; Gildersleeve *v.* New Mexico Mining Co., 161 U. S., 573; Haws *v.* Victoria Copper Mining Co., 160 U. S., 303; San Pedro & Cañon Del Agua Co. *v.* United States, 146 U. S., 120; Mammoth Mining Co. *v.* Salt Lake Foundry & Machine Co., 151 U. S., 447)."

Marshall *v.* Burtis, 172 U. S., 634-635.

"The Supreme Court of the Territory was called upon to make a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court in the admission or rejection of evidence when excepted to. Our jurisdiction is limited to the consideration of such exceptions and to determining whether the findings of fact support the judgment (Harrison *v.* Perea, 168 U. S., 311; Young *v.* Amy, 171 U. S., 179)."

Crowe *v.* Trickey, 204 U. S., 234.

The Supreme Court of Arizona made a statement of the facts in this case (Abstract, folios 305 to 325), but did not certify to any rulings upon evidence. All questions of evidence are therefore eliminated. Much of the evidence is extended at length in the Abstract; for what purpose I do not know. As stated by Mr. Justice Brewer, speaking for the court, in San Pedro and Cañon Del Agua Co. *v.* United States, 146 U. S., 131, such matter only encumbers the record:

"Hence, notwithstanding the large volume of testimony taken and used in the court below has been incorporated into the record sent to us, we are not at liberty to review the testimony for the purpose of ascertaining whether the findings in the statement of

facts are or are not in accordance with the weight of the evidence. This narrows materially the range of our inquiry."

And here I wish to call the court's attention to a matter that might prove misleading in the Abstract of Record. On page 31 of the Abstract is found "Defendants' request for findings of fact and conclusions of law," in the trial court, and then follows "Findings of fact," signed by W. P. Miller, attorney for defendants. The findings here given and on the succeeding pages, 32, 33, 34, 35, 36, and 37 of the Abstract, were refused by the trial court, and other and complete findings were made; these true findings were omitted from the record without the knowledge or consent of appellee and by the direction of appellants (Abstract, folios 93 and 343).* The abstract now before the court then proceeds:

"And from the foregoing facts the court makes the following CONCLUSIONS OF LAW." (Abstract, folio 93.)

Next follows the true conclusions of law, signed by the judge of the trial court and made and based upon the true findings of fact, which have been omitted. The abstract, as made up, might well lead this court to believe that the conclusions of law were based upon the refused and denied findings presented by the appellants. The true findings of fact made by the trial court are identical with the statement of facts made by the Supreme Court (Abstract, folios 305 to 325, inclusive) and abundantly sustain the conclusions of law.

As before stated, therefore, there being no certification of exceptions to evidence by the Supreme Court of Arizona or any judge thereof, the one question or matter for the determination here is, Do the findings of fact or statement of facts made by the Supreme Court of the Territory support the judgment?

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*NOTE.—The true findings have now been sent up, at request of appellee.

1. *Appellants' First Assignment: That the trial court erred in not sustaining the plea of another suit pending.*

Appellants confess, on page 14 of their brief, that their plea of another suit pending was bad, and do not argue the assignment. It need not, therefore, be considered.

2. *Appellants' Second Assignment: That the trial court erred in not finding that the petition for removal of block 206 contained the statement that all of said block should become a part of Congress street.*

The court did so expressly find in the true findings, omitted from the record, at the request of appellants. (See Findings of Supreme Court, Abstract, folios 307 and 308, which findings are conceded by the appellants to be the same as those of the trial court—Brief, page 12.) But, again, the assignment is not argued, is immaterial, and is wholly without merit.

3. *Appellants' Third Assignment: That the trial court erred in refusing to find that the city did not appoint an estimating or appraising committee.*

The improvement for which the assessment was here levied was one consisting entirely of the taking of property. The whole and entire improvement was the removal of a block in the midst of a street. It was necessary to condemn under the Eminent Domain act, and condemnation proceedings were had. The cost of the improvement was fixed by the judgment of the court in this proceeding, and the court further fixed, as directed by statute, the cost of making and levying the assessment.

It has been shown in the brief synopsis of the statutes heretofore made, that two methods of determining the cost of improvements and making assessments are provided: Where

the ordinance for the improvement does not require the taking of property, the Common Council shall appoint an appraising committee; and when this committee has reported, shall appoint a second committee to make the assessment. Where the ordinance does provide for the taking of property, and this is the improvement, condemnation proceedings shall be had, and the amount determined by the court shall constitute the cost of the improvement; and the court shall appoint the assessing committee to assess the amount so determined. In one instance the council acts, in the other the court. It would indeed be strange to require a court and jury to determine the amount, and also require a committee of the Common Council to do likewise, and it would be stranger still if the two bodies should agree. The assignment is without merit.

4. *Appellants' Fourth Assignment: That the trial court erred in not finding that no notice was given of the meeting of the Common Council upon the confirmation proceedings.*

In special assessment proceedings, but one notice to the owner of the property assessed is required.

> "It is settled that, if provision is made 'for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of the law' (McMillen *v.* Anderson, 95 U. S., 37; Davidson *v.* New Orleans, 96 U. S., 97; Hagar *v.* Reclamation District, 111 U. S., 701; Spencer *v.* Merchant, 125 U. S., 345)."
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> Paulsen *v.* Portland, 149 U. S., 41.

The statutes of Arizona provide:

> "It shall be the duty of such committee (assessing commissioners), within five (5) days after their appointment, to fix a place when and where they will

> meet to consider and decide upon such assessments, which time shall be not less than fifteen (15), nor more than twenty (20) days from the date of their appointment. They shall give notice by mail to each owner of premises to be assessed, whose name and place of residence is known to them, and upon diligent inquiry can be ascertained, of the time and place of their meeting; such notice shall be mailed at least ten (10) days before such day of hearing. They shall also * * * post notices and publish the same, and the notice shall be in certain form."
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> Sec. 473, Revised Statutes of Arizona, 1901, Appendix "B."

This is the sole and only notice required by the statute. This notice was given in strict conformity with the statute (Abstract, folios 311, 312). In response to this notice, appellant appeared at the time and place designated in the notice and "entered a protest against the said assessment on said defendant's property, without stating any reason why the said assessment was unjust or unlawful, but did expressly state that the said protest was made for the sole purpose of saving the question of review; and further stated that the said A. R. English did not wish to intimate that he had any objections, but wanted to save his right to it if any he should have" (Abstract, folio 323).

All the steps taken in making a special assessment constitute but one proceeding; and the appellants, having been regularly brought into the proceedings by due and legal notice and having appeared, were bound to take notice of when the Common Council would meet to confirm the assessments, without further service. The statute of the Territory requiring but one notice is valid, and was obeyed to the letter.

5. *It is contended, but not assigned as error, that the assessment was by the front-foot rule and not for benefits.*

In their statement of the case, appellants have extended excerpts from the evidence, which standing alone might be misleading. I refer to pages 3 and 4 of Brief. As setting forever at rest all matters appertaining to the basis of the assessment, I quote the finding of the Supreme Court of the Territory thereon:

> "That said commissioners (duly appointed) examined the locality where the said improvement was proposed to be made, and the lots, blocks, tracts, and parcels of land that shall (should) be benefited thereby, and estimated what proportion of the total cost of such improvement would be of benefit to the public, and what proportion thereof would be of benefit to the property benefited, and apportioned the same between the city and such property, so that each had its relative equitable proportion; and having found such amounts, said commissioners apportioned and assessed such amounts so found to be a benefit to the property upon the several lots, blocks, tracts and parcels of land, in the proportion in which they were severally benefited by such improvement; but that no lot, block, tract or parcel of land was assessed by said commissioners in a greater amount than it was actually benefited" (Abstract, folios 309 and 310).

The question of benefits, and the property to which these benefits extend, is of necessity a question of fact.

Spencer *v.* Merchant, 125 U. S., 353.

Appellants' property was assessed in the amount it was actually benefited by the improvement and no more.

6. *Appellants' Fifth Assignment: That findings of fact 20 and 23 are not sustained by the evidence.*

Here again the assignment is not argued and is evidently made with little faith. We have only to call the court's attention to the point that the Supreme Court of Arizona made these findings as well as the trial court, and there is not a scrap of evidence before this court; and, in addition, the most cursory examination of these findings will show that they are in reality conclusions of law, based upon findings already made.

7. *Appellants' Sixth and Seventh Assignments: That appellee cannot maintain this action.*

Appellants in effect concede that, by reason of their failure to object in the assessment proceedings and to appeal from the confirmation by the council, they are foreclosed on the merits; accordingly they rest their appeal on the one point, that appellee cannot maintain this action.

In the discussion here I shall not go behind the Revised Statutes of Arizona of 1901. This revision contains all of the law in force at the time, and with the amendments constitutes the whole statute law of the Territory.

The contention is, that this action cannot be maintained by the Territory of Arizona at the relation of the treasurer and tax collector of Pima County.

The statutes provide for two methods of enforcing the collection of delinquent assessments.

First Plan: At any time after special assessments become due, the Common Council may authorize the city collector to begin an action. Suit may or may not be brought, as the council may elect. If the action is brought, it is of a summary character.

> Section 495, Revised Statutes of Arizona, 1901, Appendix "B."

Second Plan: "It shall be the duty of the collector of special assessments, within such time as the Common Council may provide, *but in no event later than the 21st day of December* of the year in which the said assessment was made, to make a report in writing to the general officer of the county, authorized by the general revenue laws of the Territory, to sell for taxes due the county and Territory, all of the lands, town lots and real property upon which he shall have been unable to collect special assessments, with the amount of special assessments due and unpaid thereon," etc.

Section 483, Revised Statutes of Arizona, 1901, Appendix "B."

> "Upon the delivery of such delinquent list to the county collector of taxes of such county, such county collector shall deliver to said city collector his receipt for the total amount of the special assessments so delinquent, which receipt said city collector shall file with the city treasurer, and the city treasurer shall thereupon charge the amount specified in said receipt to the county collector. Upon the receipt of said delinquent list, it shall be the duty of the county collector to incorporate said list with the county delinquent list * * *; and he shall sell such delinquent city property at the same time and in the same manner, for such city delinquent special assessments, as real property is required to be sold by law for county and territorial delinquent taxes." * * *
>
> Section 484, Revised Statutes of Arizona, 1901, Appendix "B."

The two plans above outlined were re-enacted at the same time, in the same act, and are to be construed together and harmonized. In this there is no difficulty. The first plan *may* be followed, and if by it the assessment is collected prior to December 21 following the assessment, the matter ends, for in such event the tax is no longer "due and unpaid." The quick summary method has proven sufficient. If, however, the first method, if followed, has not resulted in the actual collection and payment of the tax prior to December

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21, then the tax, whether in suit or not, is "due and unpaid," the city collector has "been unable to collect," and he *must* report the tax for collection to the county official. In such event the duties of the city collector end with his report and he is no longer known in the transaction. The money when collected is not paid to him, but direct to the city treasurer. On making his report the city collector loses jurisdiction.

The point is clearly brought out by the Supreme Court of Ohio upon similar statutes:

> "These sections clearly give the corporation power to sue within two years (here until Dec. 21st of each year) for the collection of such assessments as have not been certified to the county auditor, but after such assessment has been so certified, the power of the corporation to sue for and collect the same no longer exists, and thereafter the right of action for the collection of such assessment is vested alone in the county treasurer, and he shall collect the assessments with, and in the manner as State and county taxes. It is therefore clear that the city of Bellaire had no cause of action against said defendants below." * * *
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> Central Ohio *v.* City of Bellaire, 67 Ohio State, 297.

After December 21 of each year, there is, therefore, but one method for the collection of delinquent assessments. On December 21, 1904, the assessment in this case being due and unpaid, the city collector, in compliance with the statute, reported the tax as due and unpaid, and the county collector incorporated the tax with his delinquent territorial and county taxes (Abstract, folios 317, 318, and 319).

The argument being narrowed to the point that the remedy must be enforced by the county officer, a matter now conceded by the appellants, the sole inquiry that remains is, What is the method of enforcement to be pursued by this official?

In the year 1901 all the laws of Arizona were codified and revised. The method then provided for the collection of

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delinquent county and Territorial taxes was as follows: The tax collector should publish notice of delinquent taxes, and state the time and place that delinquent property should be sold, unless the taxes were paid; the property, if not redeemed, should be sold by the tax collector, and the purchaser should receive a certificate of sale, and thereafter, and in a year, if the taxes still remained unpaid, the tax collector should give a deed of the property sold to the purchaser. Such were the provisions for the enforcement of collection of the general revenue. In the Special Assessment act of the same revision it is provided that the county officer "shall sell such delinquent city property at the same time and in the same manner, for such city delinquent assessment, as real property is required to be sold by law for the county and territorial delinquent taxes, giving the same notice of sale as is now or may be required by law in regard to sales of real estate for delinquent county and Territorial purposes" (section 484, Appendix).

Here, then, was a uniform method for the collection of all delinquent taxes of whatever character, and that it was the intention of the Legislature that all delinquent taxes should be collected in the same manner is convincingly shown by section 488, Revision 1901, Arizona, Appendix "B."

> "The general revenue laws of this Territory in reference to proceedings for the collection of delinquent taxes on real property, the sale thereof, the execution of certificates of sale and deeds thereon, the force and effect of such deeds and sales, and all other laws in relation to the enforcement and collection of delinquent taxes, and redemption of tax sales, except as herein otherwise provided, shall be applicable to proceedings to collect such special assessments."

With the law in this condition, the Legislature, in 1903, repealed the entire chapter on the enforcement of delinquent

taxes on real property, and provided that all back or delinquent lists should be made into a book called the "Back Tax Book;" that the treasurer and *ex-officio* tax collector should bring suit upon said delinquencies in the name of the Territory of Arizona; that said suit should be placed in judgment, execution issue, and the property sold thereunder.

That no doubt might exist as to what delinquencies should be thus enforced, it is provided:

> "SECTION 96. All back taxes, of whatever kind, appearing due upon delinquent real estate shall be extended in the Back Tax Book, made under this chapter, and collected by the tax collector under authority of this chapter."

We then have this result: The city collector must certify delinquent special assessments to the county officer, to be incorporated by him in the general delinquent list and collected as county and territorial delinquent taxes are collected; and the county collector must extend in the Back Tax Book his delinquent list, containing "all back taxes of whatever kind," and collect the same by suit. *It is the one method now provided by law for the enforcement of delinquencies,* the other by sale, deed, etc., having been repealed.

I cannot do better than quote from the opinion in this case of the Supreme Court of Arizona. The sections of Act No. 92, Laws of Arizona, 1903, referred to *supra* and by the court, are contained in appendix to this brief and marked "C."

> "It is contended by the counsel for appellants that Act No. 92 of the Laws of 1903, providing for suits to be instituted to recover delinquent taxes by the tax collectors of the several counties in the name of the Territory has no application to delinquent special assessments levied by cities under the provisions of said chapter 2, title II, of the Revised Statutes:
>
> "Paragraph 483 of the Revised Statutes, being section 19 of said chapter 2, title II, provides that when

the city collector shall be unable, before the 21st day of December of the year in which any special assessment is made, to collect any such special assessment, he shall deliver the delinquent list of all the lands, town lots and real property upon which he shall have been unable to collect such special assessments, with the amount of the same due and unpaid, to the tax collector of the county, who shall incorporate said list with the county delinquent list. The next section provided that the tax collector of the county shall sell the delinquent city property for city delinquent special assessments at the same time and in the same manner as real property is required to be sold by law for county and territorial delinquent taxes.

"These sections considered alone might well be construed as excluding any other method of collecting delinquent special assessments than as therein provided, which was the method provided by the general revenue laws of the Territory for the collection of delinquent taxes on real property in force at the time chapter 2, title II, took effect. We think, however, that paragraph 488 should be construed with paragraph 484 in this connection. Paragraph 488 reads:

" 'The general revenue laws of this Territory in reference to proceedings for the collection of delinquent taxes on real property, the sale thereof, the executions of certificates of sale and deeds thereon, the force and effect of such deeds and sales, and all other laws in relation to the enforcement and collection of delinquent taxes and redemption of tax sales, except as herein otherwise provided, shall be applicable to proceedings to collect such special assessments.'

"Act 92 of the Laws of 1903 repealed the general revenue law of the Territory in reference to proceedings for the collection of delinquent taxes on real property. By this act the tax collector was deprived of his power to sell real property for delinquent taxes levied thereon. In lieu of such sale the statute provided for suits to be instituted against the several delinquent taxpayers by the tax collector in the name of and for the use of the Territory. Unless, therefore, the act of 1903 applies to delinquent special assessments, there would be no method provided by

the existing statutes for the sale of delinquent city property for delinquent special assessments. A reading of section 84 of the act will make clear that the intent of the legislature was to make the method of collecting delinquent taxes provided for in the act applicable to all delinquent taxes which may appear on the tax roll. Said section reads:

"'Within sixty days after the taking effect of this chapter, and every year thereafter, within thirty days after the settlement of the tax collector, the several clerks of the county boards of supervisors in each county in this Territory, shall make in a book to be called the "Back Tax Book" a correct list in numerical order of all tracts of land and town lots on which back taxes shall be due in such county, city or town, setting forth opposite each tract of land or town lot the name of the owner,' etc.

"Again, section 96 of said act reads:

"'All back taxes, of whatever kind, appearing due upon delinquent real estate shall be extended in the "Back Tax Book" made under this chapter, and collected by the tax collector under authority of this chapter.'

"We conclude, therefore, that this suit has properly been brought in the name of the Territory, at and by the relation and to the use of the Treasurer and tax collector of the county" (Abstract, folios 279-282, inclusive).

After the above decision was rendered, appellants obtained a rehearing and submitted an elaborate brief on the point in question. Upon this rehearing the court say:

> "We have carefully reviewed the questions raised by this appeal in the light of the supplemental briefs filed upon rehearing, but find no reason to change our views and decision as expressed in the opinion written by Mr. Justice Sloan upon the original submission of the cause" (Abstract, folio 301).

While it is true that the ruling of the Supreme Court of the Territory on a construction of local statutes does not in

any way preclude this court from reviewing it, yet such a construction is always entitled to great respect.

> "It is true that this ruling of the Supreme Court of the Territory does not, even in a question of practice arising under the local law, preclude this court from reviewing it, as would a decision of a State Supreme Court in similar circumstances; but unless a manifest error is disclosed, we should not feel disposed to disturb a decision of the Supreme Court of a Territory construing a local statute. So far from discovering manifest error in that ruling, we concur with the Supreme Court of the Territory in their disposition of the question."
>
> Fox *v.* Haarstick, 156 U. S., 679.

> "On the other hand, while this court cannot refuse to exercise its own judgment, it naturally will lean toward the interpretation of a local statute adopted by the local court."
>
> Copper Queen, etc., *v.* Arizona Board, 206 U. S., 479.

> "The construction of the statute by the local courts (this also was an appeal from the Supreme Court of Arizona) is of great, if not of controlling, weight."
>
> Lewis *v.* Herrera, 208 U. S., 314.

The ruling of the Supreme Court of Arizona that this action was properly brought and maintained is unquestionably sound.

This disposes of the points relied on by the appellants.

Statutes on Assessments Followed to the Letter.

A comparison of the statutes of Arizona with the findings of fact on appeal by the Supreme Court will show that the statutes, in the making of the present assessment, were followed to the letter. While a substantial compliance is all the law demands, here is a literal, technical one.

A. A petition signed by the owners of a majority of the lineal frontage on the improvement was filed with the recorder of the city.

B. An ordinance was passed, in due form, by the Common Council, based upon the petition.

C. As the improvement called for condemnation of property, an action was instituted in a competent court, the property condemned, and the amount of compensation or cost determined.

D. A supplemental petition was filed and assessment commissioners appointed.

E. The commissioners gave notice to the property-owners, assessed the property for benefits received, heard objections, and made their report.

F. The Common Council confirmed the assessment.

And appellants neither objected nor appealed.

> "In nearly all of the States, probably in all of them, provision is made by law for the correction of errors and irregularities of assessors in the assessment of property for the purposes of taxation. This is generally through boards of revision or equalization, as they are often termed, with sometimes a right of appeal from their decisions to courts of law. * * * If not corrected by some of the methods pointed out by the statute, they are conclusive, whatever errors may have been committed in the assessment."
>
> Stanley *v.* Supervisors, 121 U. S., 550.

Where the statute provides a special remedy, it excludes every other.

Savings Bank *v.* U. S., 19 Wallace, 38.

The following authorities are also in point:

Village of West Duluth *v.* Norton, 63 Minn., 497.
Thompson *v.* People, 184 Ills., 17.
Allen *v.* City of Lebanon, 146 Ind., 125.
McSherry *v.* Wood, 102 Cal., 651.
City of New Whatcom *v.* Bellingham, 18 Wash., 181.
Annie Wright Seminary *v.* City of Tacoma, 23 Wash., 109.

The judgment of the Supreme Court of Arizona is right and should be affirmed.

Respectfully submitted,

SAMUEL L. KINGAN,
Attorney for Appellee.

APPENDIX.

EXHIBIT "A."

"Ordinance No. 168.

"Providing for Altering and Widening Congress Street, Between Church Street and Court, in the City of Tucson, Arizona.

"Whereas, a petition has been filed with the City Recorder of the city of Tucson, signed by the owners of the majority of the lineal frontage upon block 206 in said city, praying that proceedings be taken to condemn all private property in said block 206, and that the land embraced therein be thrown open as a street and thoroughfare and made a part of Congress street, and that such improvement be made by special assessment; and

"Whereas, it is necessary to condemn the said block 206 and all thereof for public use for the purpose of widening and improving Congress street between Church street and Court street;

"Now, therefore, be it ordained by the Mayor and Common Council of the City of Tucson, as follows:

"SECTION 1. That Congress street, between Church street and Court street, in the city of Tucson, Arizona, be opened and widened so as to include all of the land now lying in block 206 of said city, bounded on the east by Church street and on the South by Congress street, on the west by Court street and on the north by Maiden Lane.

"SEC. 2. *Be it further enacted,* That it is necessary to widen the said Congress street between the limits above described, and to condemn the said block 206 and all thereof, for said purpose of so widening Congress street.

"SEC. 3. That proceedings be at once instituted by the proper officers of this city for the purpose of having said premises and the improvements thereon condemned; and for making just compensation therefor to the end that the legal right and title to remove the said improvements and

convert the said described lands to public use shall vest in the city.

"SEC. 4. That all that part of Maiden Lane lying between Church street on the east and Court street on the west, and all of the premises described in section 1, after the condemnation and removal of the improvements thereon, shall become a part of said Congress street, for public use.

"SEC. 5. All costs, damages and expenses incurred in carrying out the provisions of this ordinance shall be defrayed by special assessment, to be levied upon the several lots, blocks, tracts and parcels of land within this city that shall be benefited by the said improvement, in the proportion in which they will be severally benefited by such improvement.

"SEC. 6. This ordinance shall be in effect from and after its passage and approval.

"SEC. 7. All ordinances and parts of ordinances in conflict with this ordinance are hereby repealed.

"Passed and approved by the Mayor and Common Council of the City of Tucson this 19th day of June, A. D. 1903.

"Approved June 19, 1903.

"C. F. SCHUMACHER, *Mayor.*

"Attest:

"[SEAL.] N. E. HAWK,

"Ex Officio City Clerk pro Tem."

"EXHIBIT 'B.'

"166. (SEC. 2.) When any city shall, by ordinance, provide for the making of any local improvement, it shall by the same ordinance prescribe whether the same shall be made by special assessment or by taxation of contiguous property or general taxation, or both. But no such improvement shall be made or ordered made by special assessment or taxation of contiguous property in the first instance, unless a petition for the making of such improvement, signed by the owners of a majority of the lineal frontage upon such improvement shall have first been filed with the city recorder, but this restriction shall not be applicable to nor limit the common council in making and ordering any and all repairs on such improvements after the same have once been made.

"467. (SEC. 3.) Should said ordinance provide for improvements which require the taking or damaging of property, the proceedings for making just compensation therefor shall be the same as provided in title 21, Revised Statutes of this territory.

"468. (SEC. 4.) When the ordinance under which said improvement is ordered to be made shall provide that such improvement shall be made by general taxation, the cost of such improvement shall be levied and collected with and as part of the general taxes of such city, but no street paving or street grading in the first instance, or the making or repairing of sidewalks shall be made or ordered made, except at the expense of abutting property.

"The expense of paving or otherwise improving all street intersections shall be paid out of the general funds of the city, and all cross walks and intersections of streets and alleys and across public grounds shall be laid and kept in repair at the expense of the city at large. After a street shall have been once graded to an established grade and improved by special assessment of contiguous property, it shall be kept in repair at the expense of the city. This section shall not, however, apply to the repair of sidewalks, which in all instances shall be repaired and renewed by the owners of abutting lots, and if not so repaired and renewed on an order made by the common council requiring such repair and renewal, and served upon the occupant or owner of the abutting lot, either personally or by mail, within twenty (20) days after such service, then such repairing or renewing shall be done by the city and the expense thereof be and become a lien upon such abutting lot and be placed in the next tax-roll of such city as a tax upon such property and collected or said lot sold therefor, as other city taxes are collected or sales made for taxes.

"469. (SEC. 5.) When such ordinance under which said local improvement shall be ordered shall provide that such improvement shall be made or paid for in whole or in part by special assessment or by special taxation of contiguous property, the same shall be levied, assessed, and collected in the manner provided in the sections of this act, providing for the mode of making, levying, assessing, and collecting special assessments.

"Special Assessments.

"470. (SEC. 6.) Whenever such local improvements are to be made wholly or in part by special assessment, the common council of such city shall pass an ordinance to that effect, specifying therein the nature, character, locality, and description of such improvements: *Provided*, That whenever any such ordinance shall provide only for the building, repairing or renewing of any sidewalk, the owner of any lot or piece of land fronting on such sidewalk shall be allowed thirty (30) days after the time at which such ordinance shall take effect in which to build or renew such sidewalk opposite his land, and thereby relieve the same from assessment: *Provided*, That the work so to be done shall in all respects conform to the requirements of such ordinance.

"471. (SEC. 7.) The common council shall appoint three (3) of its members or any three (3) competent persons, who shall make an examination of the premises to be affected and make an estimate of the cost of the improvements contemplated by such ordinance including labor, materials and all other expenses attending the same, and cost of making and levying the assessment, and shall report the same in writing to said common council.

"472. (SEC. 8.) On such report being made and approved or modified by said common council, it shall be the duty of the common council to appoint a committee of three (3) persons, residents of said city, one of whom shall be the assessor of said city, who shall examine the locality where the improvement is proposed to be made, and the lots, blocks, tracts and parcels of land that shall be benefited thereby and to estimate what proportion of the total cost of such improvement will be of benefit to the public and what proportion thereof will be of benefit to the property to be benefited, and apportion the same between the city and such property, so that each shall have its relative equitable proportion, and having found such amounts to apportion and assess such amount so found to be of benefit to the property upon the several lots, blocks, tracts and parcels of land in the proportion in which they will be severally benefited by such improvement: *Provided*, That no lot, block or tract of land shall be assessed in a greater amount than it will be actually benefited.

"473. (SEC. 9.) Said committee shall also make or cause to be made an assessment roll, in which shall appear the names of the owners, so far as known, a description of block, lot, tract or parcel of land, and the amount assessed as benefits thereto, and in which shall be set down as against the city the amount they shall have found as public benefit, and certify such assessment roll to the common council of such city by which they were appointed, within at least thirty (30) days from the date of their appointment.

"It shall be the duty of such committee within five (5) days after their appointment to fix a time and place when and where they will meet to consider and decide upon such assessments, which time shall be not less than fifteen (15) nor more than twenty (20) days from the date of their appointment. They shall give notice by mail to each owner of premises to be assessed whose name and place of residence is known to them or upon diligent inquiry can be ascertained, of the time and place of their meeting, such notice shall be mailed at least ten (10) days before such day of hearing. They shall also cause notice to be given of such hearing by publishing notices in at least four (4) public places in such city, two (2) of which shall be in the neighborhood of such improvement, and by publishing the same at least once in a newspaper published in said city. The notice shall be substantially as follows:

"*Special Assessment Notice.*

"Notice is hereby given to all personally interested, that the common council of —— having ordered that (here insert nature and description of improvements substantially as in ordinance), and having appointed the undersigned a committee to examine and report upon such improvement, and to make an assessment of the costs of said improvement according to the benefits upon the property contiguous thereto, a hearing will be had by said committee of all persons interested in said improvement and the lands to be affected by a special assessment therefor at —— on the —— day of —— at —— o'clock. All persons desiring may then and there appear and make any objections they may have to such improvement and assessment.

"——— ———,
"——— ———,
"——— ———,

"All persons interested in any real estate to be affected by such special assessment may appear and be heard before such committee with such witnesses as they may produce.

"474. (SEC. 10.) If upon such hearing it shall appear that any premises assessed for said improvements in the roll prepared by such committee are assessed more or less than they will be benefited, or more or less than the proportionate share of the cost of the improvement which such premises should justly bear, the committee shall amend and change its assessment accordingly, and shall certify said roll as so corrected to the common council, with the testimony, if any, taken by said committee.

"475. (SEC. 11.) Upon presentation of such roll and the report of such committee to the common council, it shall proceed to examine and reject, confirm or modify and confirm the assessment roll and the assessments therein contained, and thereupon if such assessments be confirmed, or modified and confirmed, the same shall stand as a valid tax and be a lien upon the several lots, blocks and pieces of land assessed therein, as other and general city taxes are, to the amount of such assessment against each lot, block or piece of land.

"*Provided, however*, That the common council shall have the right and power to provide that such tax may be paid in equal annual installments not to exceed ten in number, the first installment to be payable on the day of said levy, and each subsequent installment annually thereafter until the entire tax is paid. Each such installment shall bear interest from the date of levy until paid at such a rate per annum as the common council may prescribe, but in no event at a less rate than five per centum per annum. The interest on each installment shall be due and payable at the same time as the installment is due and payable and shall be a lien on the property assessed to the same extent as the tax levied, and shall be deemed and considered as a part of the tax.

"The failure to pay any installment of said tax when the same is due and payable shall make the entire tax due and payable and proceedings shall be taken by the proper officers for the collection of the entire tax so levied and remaining unpaid, as is now or may hereafter be provided for the collection of delinquent taxes or special assessments.

"476. (SEC. 12.) In the event the common council may elect to provide that such special assessment tax shall be paid

in annual installments as above provided, then and in such event the cost and expense of the improvement for which said special assessment was made may in the first instance be paid out of any funds on hand or out of moneys borrowed from the city for the purpose; and for the purpose of raising money to pay for such improvement in the first instance the mayor and common council may issue bonds of the city in an amount not exceeding the expense and cost of such improvement; such bonds to bear interest at a rate not greater than the rate of interest provided for the deferred installments of such tax. All moneys realized from the special assessment tax aforesaid, or so much thereof as may be necessary, shall be applied to the payment of principal and interest on said bonds.

"477. (SEC. 13.) The common council of all cities having over two thousand inhabitants are hereby empowered to appoint a commission of not less than five or more than seven taxpayers of their respective cities, who shall have power to negotiate and sell all bonds that have been voted by the citizens of said city; to make all contracts for public improvements that shall amount to more than ten thousand dollars and to superintend the construction of same. The city council shall define the duties of the commissioners, fix amount of bonds to be given by them, and their compensation.

"478. (SEC. 14.) If the owner of any parcel of land assessed for such improvement by special tax feels himself aggrieved by reason of the determination made by the common council, he may within twenty (20) days after the date of such determination, appeal therefrom to the district court; *Provided*, That in case any contract shall have been made for making the improvements, said appeal shall not affect such contract; and in case the appellant shall succeed, the difference between the amount charged in the assessment roll and the amount adjudged to be paid as benefits accruing to the parcel of real estate described in such assessment roll shall be paid by the city at large.

"479. (SEC. 15.) The appeal given by the last section shall be the only remedy of the owner of any parcel of land, or of any person interested therein, affected by said improvement, for the redress of any grievance he may have by reason of the making of such improvement.

"480. (SEC. 16.) Upon the confirmation, or modification and confirmation, of such report and assessment by the com-

mon council, the recorder of the city shall file the report and assessment, and record the action of the common council thereon. And the mayor and recorder shall thereupon issue a warrant for the collection of such special assessment and tax, and deliver the same, together with a copy of the assessment roll as confirmed by the common council, to the officer authorized to collect the general city taxes; such warrant shall direct the officer aforesaid to collect said tax as in this act provided, and give sufficient authority to collect the assessment therein, and in such copy of said roll specified.

"481. (SEC. 17.) The collector receiving such warrant shall immediately give notice thereof by publishing such notice in one or more newspapers in such city, if such newspaper there be, and if no such newspaper then by posting four copies thereof in public places along the line of the proposed improvement. Such notice shall be substantially in the following form:

"Special Assessment Notice.

"Public notice is hereby given that the common council of the city of —— have levied and assessed a special assessment upon the property benefited by the following improvement (here insert the character and location of the improvement in general terms) as will more fully appear from the assessment roll for such special assessment on file in the office of the city recorder of said city that a warrant for the collection of such assessment is in the hands of the undersigned. All persons interested are hereby notified to call and pay the amounts assessed at the collector's office (here insert location of office) within thirty (30) days from the date hereof.

"Dated this — day of ——.

"——— ———,
"Collector.

"482. (SEC. 18.) It shall be the duty of the collector in whose hands the warrant shall so come, as far as practicable to call upon all persons resident within the corporation, whose names are upon the assessment roll, of the occupants of the property assessed, and personally or by written and printed notice, left at his or her usual place of abode, inform them of such assessment and request the payment of same.

Any such collector omitting so to do shall be liable to a penalty of ten dollars ($10) for every such omission, but the validity of the special assessment, or the right to apply for and obtain judgment for any such special assessment shall not be affected by such omission. It shall be the duty of such collector to write the word 'paid' opposite each tract or lot upon which the assessment is paid, together with the name and post-office address of the person making the payment and the date of payment.

"483. (SEC. 19.) It shall be the duty of the collector of special assessments, within such time as the common council may provide, but in no event later than the 21st day of December of the year in which such assessment was made, to make a report in writing to the general officer of the county authorized by the general revenue law of this territory to sell for taxes due the county and territory, of all the lands, town lots and real property upon which he shall have been unable to collect special assessments, with the amount of special assessments due and unpaid thereon, together with his warrant or a brief description of the nature of the warrant or warrants received by him authorizing the collection thereof; which report shall be accompanied with the oath of the collector that the list is a correct report and return of the lands, town lots and real property on which the special assessment levied by the authority of the city of —— remain due and unpaid; that he is unable to collect the same or any part thereof, and that he has given the notice required by law that said warrants had been received by him for collection. Said report when so made shall be *prima facie* evidence that all of the forms and requirements of the law in relation to making said returns have been complied with and that the special assessments mentioned in said report are due and unpaid. And in any action before any court, wherein the question of the validity of such assessment is an issue, no defense or objection shall be made or heard, which might have been interposed in the proceedings for the making of such assessment or the application for confirmation thereof.

"484. (SEC. 20.) Upon the delivery of such delinquent list to the county collector of taxes of such county, such county collector shall deliver to said city collector his receipt for the total amount of the special assessments so delinquent, which receipt said city collector shall file with the

city treasurer, and the city treasurer shall thereupon charge the amount specified in said receipt to the county collector. Upon the receipt of said delinquent list it shall be the duty of the county collector to incorporate said list with the county delinquent list, noting in such list what property is delinquent for such special assessment by placing the words 'city of —— special assessment' at the head of a separate column containing the said city delinquent special assessment; and he shall sell such delinquent city property at the same time and in the same manner, for such city delinquent special assessment, as real property is required to be sold by law for county and territorial delinquent taxes, giving the same notice of sale as is now or may be required by law in regard to sales of real estate for delinquent county and territorial taxes. The county collector must collect in addition to the taxes due on such special assessment, such penalties, interest and costs as are provided by law to be collected on property delinquent for county and territorial taxes.

"485. (SEC. 21.) After making said sales, the list of lots, parcels of land and property sold thereat shall be returned to the office of the county recorder, and redemption may be made as provided for in the general revenue laws of this territory.

"486. (SEC. 22.) If the collector shall receive any moneys for taxes or assessments giving a receipt therefor for any land or parcel of land, and afterwards return as unpaid to the county and territorial officers authorized to sell land for taxes or shall receive the same after making such return and the same be sold for tax or assessment which has been so paid and receipted for by himself or his deputy, he and his bondsmen shall be liable to the holder of the certificate given to the purchaser at the sale for double the amount of the face of the certificate, to be demanded in two years from the date of the sale and recovered in any court having jurisdiction of the account, and the city shall in no case be liable to the holder of the certificate.

"487. (SEC. 23.) The collector or collectors, and the general officer aforesaid, to whom said warrants shall be returned, shall pay over to the city to which it shall belong all moneys collected by them, respectively, upon or by virtue of said warrant, or upon any sale for taxes or otherwise, at such time or times and in such manner as shall be prescribed by ordinance, and shall be allowed such compensation for their services in the collection of such assessments as the ordinance

of the city shall provide, not to exceed the amount of compensation fixed by general law for similar services.

"488. (SEC. 24.) The general revenue laws of this territory in reference to proceedings for the collection of delinquent taxes on real property, the sale thereof, the execution of certificates of sale and deeds thereon, the force and effect of such deeds and sales; and all other laws in relation to the enforcement and collection of delinquent taxes and redemption of tax sales, except as herein otherwise provided shall be applicable to proceedings to collect such special assessments.

"489. (SEC. 25.) Any city interested in the collection of any tax or special assessment may become a purchaser at any sale of real or personal property to enforce the collection of the same, and may, by ordinance, authorize and make it a duty of one or more city officers to attend such sale and bid thereat in behalf of the corporation.

"490. (SEC. 26.) If any assessment shall be annulled by the common council or set aside by any court, a new assessment shall be made and returned, and like notice given and proceedings had as herein required in relation to the first, and all parties in interest shall have the like rights and the common council and court shall perform like duties and have like powers in relation to any subsequent assessment as are hereby given in relation to the first assessment.

"491. (SEC. 27.) If in any case the first assessment prove insufficient a second may be made in the same manner as nearly as may be and so on, until sufficient moneys have been realized to pay for such public improvement. If too large a sum shall at any time be raised the excess shall be refunded ratable to those by whom it was paid.

"492. (SEC. 28.) All persons taking any contract with the city, and who agreed to be paid from special assessments shall have no claim or lien upon the city in any event, except from the collection of the special assessments made for the work contracted for.

"493. (SEC. 29.) All contracts for the making of any public improvement to be paid for in whole or in part by a special assessment, the expense whereof shall exceed two hundred dollars ($200.00) shall be let to the lowest responsible bidder in the manner to be prescribed by ordinance. Such contracts to be approved by the mayor of the city; *Provided, however,* That when the expense thereof shall not exceed two

hundred dollars ($200.00) any such contract may be entered into by the proper officer without advertising for bids, and without such approval, by vote of two-thirds (⅔) of all the councilmen elected.

"494. (SEC. 30.) All special assessments levied by any city under this act, shall from the date of assessment, be a lien upon the real estate upon which the same may be imposed, and such lien shall continue until such special assessments are paid. And the same proceedings may be resorted to by the collector upon any warrant or order issued or made for the collection of special assessments as in the case of the collection of territorial and county taxes under the general laws of the territory.

"495. (SEC. 31.) Any time after the same becomes due, it shall and may be lawful for such city collector, if so required by the mayor and common council of said city, to commence suit in any court of record, in the corporate name of such city against any person or persons for the total amount of special assessments for which such person or persons are liable as well as for the foreclosure of such special assessment tax lien. In such action such collector may join as defendants all persons so liable for such city assessments who have not paid the same, but no judgment can be obtained and no foreclosure had against any defendant except for the special assessment so levied against him for his particular piece of property; such action or suits shall be commenced by complaint and shall state the several amounts of the special assessments sought to be recovered, the name of the person or persons owing the same and a description of the property upon which such special assessment is a lien, and give a general description of the warrant or warrants issued for the collection thereof. Upon the filing of the complaint a summons shall be issued and served and returned as in other suits in such courts. Upon return of such summons duly served, the court shall therewith proceed to a hearing of such complaint without formal pleadings and may render formal judgment for all or any part of such special assessment against the person or persons respectively liable thereto, as the right and justice of the case may require, and may further decree a foreclosure and sale of the lands upon which such special assessment respectively are a lien, in the same manner as is now provided by law for the foreclosure and sale of liens or mortgages on real estate; and in such action

said court may render personal judgment against the persons respectively liable for such special assessments; upon which judgments executions may issue as is now provided by law. The general laws of the Territory of Arizona in reference to the enforcement of judgments and executions, foreclosure sales, rights of redemption, issuance of sheriff's certificates of sale and sheriff's deed shall be applicable to the proceedings under this section: *Provided, however,* That whenever any bonds are issued by the common council of any city, they must have been authorized by a vote of the people in accordance with acts of Congress and the laws of the Territory of Arizona.

"496. (SEC. 32.) Whenever any city shall apply to any court for the purpose of making just compensation for property taken or damaged by such proceedings as are authorized by this act, and the laws of the Territory, such city may file in the same proceeding a supplemental petition praying the court to cause an assessment to be made for the purpose of raising the amount necessary to pay the compensation and damages which may be, or shall have been awarded to the property taken or damaged, with the costs of the proceeding. The said court shall have the power at any time after such supplemental petition shall have been filed, to appoint three (3) commissioners to make such assessment, and to ascertain as near as may be the costs incurred to the time of such appointment and the probable further cost of the proceeding, including therein the estimated costs of making and collecting such assessments and shall direct such costs to be included by such commissioners in making such assessment. Like proceedings in making said assessment shall be had and the assessment shall be made, collected and enforced in the same manner, as near as may be, as is provided for in this act in other cases.

"497. (SEC. 33.) Any city may levy a tax for general municipal purposes not to exceed for any one year seventy (70) cents on each one hundred dollars of taxable property in such city: *Provided*, That nothing in this act contained shall limit the powers now given to any incorporated city by its charter."

"EXHIBIT 'C.'

"No. 92.

"An Act to Amend Chapter VII of Title LXII of the Revised Statutes of Arizona, 1901, Entitled 'Collection of Delinquent Taxes.'

"*Be it enacted by the Legislative Assembly of the Territory of Arizona.*

"SECTION 1. That Chapter 7 of the Title 62 of the Revised Statutes of Arizona, 1901, be, and the same is hereby amended so that said chapter shall read as follows:

"SECTION 84. Within sixty days after taking effect of this chapter and every year thereafter within thirty days after the settlements of the tax collector the several clerks of the county boards of supervisors in each county in this Territory shall make in a book to be called the 'back tax book' a correct list in numerical order of all tracts of land and town lots on which back taxes shall be due in such county, city or town setting forth opposite each tract of land or town lot the name of the owner, if known and if the owner thereof be not known, then to whom the same was last assessed, the description thereof, the year or years for which such tract of land or town lot is delinquent or forfeited and the amount of the original tax due each fund on said real estate (and the interest due on the whole of said tax, at the time of making said 'back tax book' together with the clerk's fees then due), in appropriate columns arranged therefor and aggregate amount of taxes, interest and clerk's fees charged against each tract of land or town lot for all the years for which the same is delinquent or forfeited; said 'back tax book' when completed shall be delivered by the said clerk to the tax collector of the county for which he shall take duplicate receipts, one of which he shall file in his office and the other with the auditor of the Territory, and the clerk of the board of supervisors shall charge such tax collector with the aggregate amount of taxes, interest, and clerk's fees contained in said 'back tax book,' all taxes, interests, and clerk's fees hereinafter contained in the 'back tax book' herein described, shall bear interest from the time of making out said 'back tax book' at the rate of ten per cent per annum until

paid. In computing interest, under this chapter, a fraction of a month shall be counted as a whole month.

"SECTION 86. If on the first day of January, A. D. 1904, any of said lands or town lots contained in said 'back tax book' remain unredeemed it shall be the duty of the tax collector to proceed to enforce the payment of the taxes charged against such tract or lot by suit in the courts of competent jurisdiction of the county where the real estate is situated, which same court shall have jurisdiction without regard to the amount sued for, to enforce the lien of the Territory and for the purpose of prosecuting suit for taxes under this chapter the collector shall have power, with the approval of the county board of supervisors, to employ such counsel as he may deem necessary who shall receive, as fees in any suit such sum, not to exceed twenty-five per cent of the amount of the tax actually collected and paid into the treasury, as may be agreed upon in writing and approved by the county board of supervisors before such services are rendered, which sum shall be taxed as costs in the suit and collected as other costs, and no such attorney shall receive any fee or compensation for such services except as in this section provided, and it shall be the duty of the tax collector when suit shall have been commenced against any tract of land or town lot in said 'back tax book' to note opposite said tract of land or town lot such fact also against whom suit has been commenced.

"SECTION 87. All actions commenced under the provisions of this chapter, shall be prosecuted in the name of the Territory of Arizona at the relation and to the use of the tax collector, and against the owners of the property; and the lands owned by the same persons may be included in one petition and in one count thereof, for the taxes for all such years as taxes may be due thereon, and the said petition shall show the different years for which taxes are due, as well as the several kinds of taxes or funds to which they are due, with the respective amounts due to each fund, all of which shall be set forth in a tax bill of said back taxes, duly authenticated by certificate of the tax collector and filed with the petition, and said bill or bills, so certified, shall be *prima facie* evidence that the amount claimed in said suit is just and correct and all notices and process in suit under this chapter shall be sued out and served in the same manner as in civil actions in district courts, and in case of suit against

non-residents, unknown parties, or other owners on whom service can not be had by ordinary summons, the proceedings shall be the same as now provided by law in civil actions affecting real or personal property. In all suits under this chapter, the general laws of this Territory as to practice and proceedings in civil cases shall apply, so far as applicable and not contrary to this chapter.

"SECTION 96. All back taxes, of whatever kind, appearing due upon delinquent real estate shall be extended in the 'back tax book' made under this chapter, and collected by the tax collector under authority of this chapter."

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 180.

ALLEN R. ENGLISH AND HONORA ENGLISH, His Wife, Appellants,

vs.

THE TERRITORY OF ARIZONA AT THE RELATION AND TO THE USE OF JOHN W. BOGAN, TREASURER AND EX OFFICIO TAX COLLECTOR IN AND FOR THE COUNTY OF PIMA, IN THE TERRITORY OF ARIZONA.

REPLY BRIEF FOR APPELLEE.

In their reply brief appellants complain:

1. That at the time of the commencement of this action another action was pending; and

2. That the act of the Legislature of Arizona, Act No. 92, Laws of 1903, is inapplicable.

I.

PRIOR ACTION.

It has been shown in the main brief for appellee that the action brought by the City of Tucson in April, 1904, and in which action nothing was done beyond commencing

it, fell and ended on December 21, 1904, because of lack of power on the part of the municipality to bring or maintain an action after the municipality had certified all of its delinquencies to the county official for collection. The present action by the county official was not begun until April, 1905, long after the former suit had ended.

And again the former suit was dismissed.

And again appellants have admitted (page 14 of their brief) that their plea was so defective as not to merit consideration.

And finally on this point, the plea of another suit pending is a plea in abatement, and in this instance does not go to the jurisdiction. On appeal, this court will not consider a plea of this nature.

Barzilla Stephens *vs.* Monongahela, etc., 111 U. S., 197.

II.

Act of 1903 Only Law Applicable.

Appellants appear to be under the impression that Act No. 92, Laws of Arizona 1903, was not in force at the time the assessment here in question was made. The act was passed in March, 1903. The assessment was made in December, 1903. It was the one law in force relating to the collection of delinquencies during the whole period covered by this assessment, and is yet the law.

As heretofore shown in the main brief, and as pointed out by the Supreme Court of Arizona in deciding this case below, it is the *one* method provided for the collection of delinquencies. Appellants say the law is harsh and imposes penalties. There was an excellent way to avoid these penalties.

The judgment should be affirmed.

Respectfully submitted,

Samuel L. Kingan,
Attorney for Appellee.